

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re Applications of

The Lutheran Church/Missouri Synod)	MM Docket No. 94-10
)	
For Renewal of Licenses of Stations)	File Nos. BR-890829VC
KFUO/KFUO-FM, Clayton, Missouri)	BRH-890929VB

TO: Hon. Arthur Steinberg, Administrative Law Judge

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW OF
THE MISSOURI STATE CONFERENCE OF BRANCHES OF
THE NAACP, THE ST. LOUIS BRANCH OF THE NAACP,
AND THE ST. LOUIS COUNTY BRANCH OF THE NAACP**

VOLUME II

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September 6, 1994

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**H. KFUO's Claims of Justification
For EEO Noncompliance**

158. After the issuance of the HDO, KFUO knew it would be faced at trial with evidence of EEO noncompliance, including discrimination. KFUO could have fired those responsible, such as Devantier and Stortz. Instead, KFUO fired Reed Miller and Marcia Cranberg. Armed with new counsel who were not responsible for the original misdeeds, KFUO commenced a coverup combined with demurrers and avoidance.

1. Purported Financial Distress

159. According to Stortz, the Stations "struggled financially throughout the License Term." KFUO Ex. 4, p. 6. Therefore, "the Stations did little or no employment advertising during the first several years of the License Term. Instead, the Stations were forced to hire people who learned about the stations through informal sources and were willing to work for low pay."^{24/} Id.

160. KFUO's December 28, 1992 Response, which is supported by Stortz' sworn declaration, went further. It said that "KFUO-FM has yet to experience a single year of commercial operation in which it has broken even." MMB Ex. 14, p. 19.

^{24/} The logical meaning of the term "informal sources" is word of mouth recruiting. Stortz did not assign it any different meaning, nor is one apparent in the record. KFUO has acknowledged that the term "resume on file" often means "word of mouth." KFUO Response to FCC Inquiry, MMB Ex. 14, p. 23.

161. Although KFUE has the burden of proof, it did not demonstrate that the Stations' own revenue stream was the only source of funds to which it could turn in order to implement EEO procedures. Indeed, KFUE was apparently dependent on the Synod for many other expenses, such as property, liability and casualty insurance. KFUE Ex. 4, Tab 5, p. 10. KFUE failed to produce evidence showing that it asked the Synod for EEO implementation funds or that such a request was denied.

162. The only evidence of KFUE's financial status in the record are balance sheets in KFUE Ex. 4, Tab 5. KFUE offered no analysis connecting the balance sheet figures to its claim of financial extremis. Nor could it have done so, since the balance sheets show reasonably healthy (and very large scale) operations. In 1983, KFUE's operating deficit was \$120,383.74 on gross revenues of \$465,131.46. Id., p. 2. In 1984, the deficit was \$148,972.23 on gross revenues of 584,356.94. Id., p. 4. In 1985, the stations had a positive operating balance of \$318,171.11, on gross revenues of \$1,137.177. Id., p. 4. In 1986, the operating balance was \$254,212.19 on gross revenues of \$1,248,245.99. Id., p. 6. In 1987, on gross revenues of \$1,090,656, the stations earned \$147,128. Id., p. 13. The stations lost \$173,851 on gross revenues of \$1,018,504 in 1988. Id., p. 33. They lost \$143,472 on gross revenues of \$1,144,262 in 1989. Id., p. 43. In each year, administrative costs ran well into the five figures. Id., pp. 2, 4, 6, 13, 33, 43.

163. The statement in KFUE's December 28, 1992 Response that "KFUE-FM has yet to experience a single year of commercial operation in which it has broken even" (MMB Ex. 14, p. 19) is meaningless, since its financial reports for 1983-1987 were combined with the AM reports. KFUE Ex. 4, Tab 5, pp. 2, 4, 6, and 13.

164. The expense attendant to sending job notices to recruitment sources was essentially zero. Local faxes cost nothing; with fax polling, they consume virtually no staff time. Postage stamps remain a good value except in the District of Columbia. KFUE failed to prove that any material time or expense would have been required to send job notices. Under cross-examination, Stortz admitted that KFUE could have afforded postage stamps. Tr. 486-87.

165. Stortz' oral testimony maintained that no EEO recruitment was done because of a "combination" of "fewer hirings and fewer resources" in the first several years of the license term. Tr. 485; see Tr. 486, 782. Stortz defined the point at which "more recruitment" commenced as "1986 forward." Tr. 783. However, as shown above, the claim of "fewer resources" is meaningless given the zero cost of EEO recruitment. This leaves the claim of "fewer hirings" as a purported justification.

166. That claim is also without merit. KFUE's list of job hires shows that the number of hires was fairly steady since 1985, and it was never inconsequential. See Table 5 supra, p. 60.

167. Finally, there is no evidence in the record that at any time during the renewal term, KFUE -- which certainly knew of its own financial condition -- amended its EEO Program to delete EEO commitments it felt it could not financially afford to fulfill.

2. Management Was Out Of The Loop

168. Another excuse originally propounded in the Opposition for failing to recruit minorities was that

KFUO has experienced a tremendous degree of management turnover during its license period. The lack of consistent leadership has increased the difficulties in maintaining a consistent recruitment program.

KFUO Ex. 4, Tab 7, p. 17.

169. Stortz put it this way:

there was high turnover in the General Manager positions, which hindered our effort to establish a consistent outreach effort during the license term.

KFUO Ex. 4, p. 11 (emphasis in original). He was referring to the departure of Lauher as General Manager. Tr. 615.

170. As noted above, Stortz maintained that because of "turnover in managerial personnel in the summer of 1989" the EEO forms Lauher prepared in July, 1989 were not being used "during the remainder of that year." KFUE Ex. 4, p. 15; see also Tr. 618. However appropriate this "out of the loop" theory might have been for a former U.S. President, such an excuse in this case is inconsistent with the facts and is a palpable misrepresentation.

171. There was certainly no turnover in the top position at the Synod. Bohlmann was the President of the Synod from 1981 to 1992. Bohlmann had been President of Concordia Seminary from 1974 to 1981, and he was intimately familiar with the Concordia arrangement. KFUE Ex. 1, p. 1 ¶2.

172. Bohlmann could not have been less attentive to the radio stations' EEO compliance. He signed the 1989 license renewal applications, having given as the only reason for doing so: "[w]e have always been proud of the Station's track record or programming service and their commitment to non-discrimination." KFUO Ex. 1, p. 2 ¶4; see also Tr. 278.

173. Nor was there any turnover in Devantier's position as Executive Director of the Synod's Board for Communications Services. He has held that position since March 1, 1982. KFUO Ex. 7, p. 1 ¶¶1-2. The general managers of the Stations reported to him. He began work at the stations in 1972, and was himself General Manager of the Stations from 1974 until March 1, 1982. Id., p. 1 ¶2.

174. Devantier was no stranger to the Stations and should have been no stranger to their EEO program. He had to approve the hiring of all of the Stations' top management employees. Tr. 811-12 (Testimony of Paul Devantier). He visited the stations two or three times a month from 1983 to 1986; then once a week beginning in 1986. KFUO Ex. 4, p. 11.

175. Yet during those visits he apparently did nothing to insure EEO compliance. Instead, he testified that he simply assumed, without seeking verification, that KFUO's line managers were obeying the law. His written statement maintained that he "relied on the operational chiefs at the Stations" for implementation." Id., p. 9 ¶17. He did not explain why, as "CEO" of the Stations, he delegated this task to others rather than performing it himself. He stated, instead, that he "believed" the operational supervisors were implementing "whatever affirmative action efforts were required by the FCC."

176. Devantier testified that this "belief" was based upon (1) the fact that when he was General Manager of the Stations in the 1970's, he had promoted an African American woman, Lula Daniels, from secretary to Coordinator of Worship Programming; (2) his belief that his subordinates were "competent, responsible people of good character"; and (3) the fact that he "discussed with each of the General Managers during the License Term, the Stations' commitment to equal employment opportunity and the desirability of hiring minority employees." Id., p. 9 ¶18. The record contains no evidence of the frequency or depth of these discussions.

177. There was no turnover in Stortz' position as Operations Manager either. Stortz served as the Stations' Operations Manager from 1978 - 1991 and as the Stations' Acting General Manager from June, 1986 to May, 1987. KFUE Ex. 4, p. 1.

178. After Lauher was fired, Devantier was Acting General Manager. Tr. 616. According to Stortz, EEO would thereupon have been "both our responsibilities," referring to Devantier and himself. Id. However, Stortz and Devantier never even discussed how these duties would be apportioned. Tr. 618.

179. KFUE did not show that its line manager turnover was unusual for the highly volatile radio business. Moreover, KFUE did not explain why it was not possible to brief each new general manager on the EEO Rule when that manager assumed his position, or to take normal steps to insure that line managers would obey the law. KFUE did not suggest that it had the slightest difficulty in supervising its line managers -- except when it came to insuring EEO compliance.

180. KFUO's claim that management turnover prevented it from compliance is further rebutted by Devantier's failure to act on two clear cut memoranda from Lauher which showed that the Stations were not complying with the EEO Rule or their own policies.

181. Lauher's direct case testimony stated that in "approximately the late fall of 1988" he attended a Missouri Broadcasters Association meeting which was essentially a license renewal seminar. KFUO Ex. 6, p. 2 14.25/ Afterward, he stated, he "decided to review the station's compliance status" including EEO compliance. Id. In December, 1988, he reviewed KFUO's 1982 EEO Program with Marcia Cranberg, KFUO's FCC attorney. Three months later, on March 9, 1989, he prepared a memorandum to Devantier on the subject of license renewal. Id. That memorandum is found at KFUO Ex. 7, Tab 5.

182. Lauher's March 9, 1989 Memorandum states:

I continually examine all aspects of station operations with respect to license renewal and report on them to the Director of Broadcast Ministries....This report is the result of on-going personal review and reading, attendance at two different renewal seminars, consultation and communication with Arnold & Porter and conversations with employees regarding past practices. It represents, to the best of my knowledge, a comprehensive review of performance, recommendations for improvements, and an outline of areas in which there is concern. All such concerns are included in this report; I know of no others....

We are taking action now to address specific concerns outlined below. Failure to do so could create significant jeopardy in license retention. If the concerns are not addressed quickly, the worst possible consequence is loss of license....

25/ Missouri radio stations' license renewal applications were due to be filed by no later than October 1, 1989. 47 CFR §§73.1020(a) and 73.3539(a).

EEO Compliance

This is the most critical area in license renewal. As Matthew Leibowitz said at the Missouri Broadcasters Association fall seminar on renewal: "Numbers do not work anymore. Now the FCC looks for affirmative action based on the EEO program model currently on file as developed by the station. The question is: Is the station following its own plan?" Marcia Cranberg agrees with the seminar view. As described below there are plenty of areas for improvement in our compliance. At the time the AM and FM operations were absorbed into the Synod certain procedures, forms, job descriptions, etc. were introduced which inadvertently put the stations in a non-compliance situation....

The NAB Legal Guide states: "...broadcasters are held to a higher EEO standard than most other private employers. Unlike most other businesses, broadcasters must comply with EEO requirements, not only as a matter of federal law, but also because the FCC reviews station compliance as part of the license application and renewal process." The guide explains [that] the FCC can and does review broadcasters' EEO records periodically. If the record is thought to be inadequate, the FCC may take various actions, including denial of license renewal.

I have discovered we are operating in violation of our own policy as currently on file. I have reason to believe this applies to the AM operation as well as the FM operation.

I have taken steps in good faith to assure full compliance in FM. I shared with [AM General Manager] Jerry Housholder those steps taken on FM.

Our performance compared to our EEO promises filed with FCC is as follows:

1. Responsibility for Implementation

Rev. Rodger P. Abatie, General Manager KFUD-AM & FM is shown as the individual responsible for administration and implementation of the EEO Program. The Director of Broadcast Ministries has been, of course, the person responsible since Rev. Abatie is no longer with the station. Rev. Abatie's name was not replaced on the form during the time Ken Lombardi served as Director of Broadcast Ministries. Now that the director's position is vacant since Ken's departure last month, I suggest we follow Cranberg's recommendation to separate the EEO Program with myself responsible for administration and implementation on FM. This means KFUD-AM will be required to file its own program and designate an individual responsible for administration and implementation of the AM's program.

2. Policy Dissemination

KFUD-AM and FM's EEO Program states: "The stations' employment application form contains a notice informing prospective employees that discrimination because of race, color, religion, national origin or sex is prohibited and that they may notify the appropriate local, state or federal agency if they believe they have been the victims of discrimination." Somehow, this was dropped at some point when revised application forms were printed. It has been reinstated on a new form.

Other segments of the current application fail to meet standards of the program and do not comply with regulations as outlined in the EEO Handbook for Broadcasters. As Matthew Leibowitz said at the MBA [Missouri Broadcasters Association] fall seminar: "Remember, this is your own station's program, not the FCC's. So make sure you're doing what you said you would do." We are doing this with the new form implemented 2/28/89.

3. Other Areas

Essential requirements for job descriptions, according to the EEO Handbook: A Practical Guide for Broadcasters, should be job specific, held to a minimum and be completely objective.

As the Guide states: "Subjective considerations have little place in the employment process; they lead to arbitrary, if not discriminatory [sic] practices, and serve as signs of discrimination. The touchstone must be objectivity." Accordingly, job descriptions for KFUD-FM have been reviewed and changed where necessary to be sure none include subjective considerations and all essential position qualifications are and remain job specific.

I have shared most of these concerns with and sought the opinion of, our Washington attorney. She is receiving a copy of this memo. I felt it important to inform you and get this action underway quickly in order to protect the best interests of the LCMS.

183. Thus, Lauher was aware of a plethora of EEO violations, both of the FCC's Rules and of the station's own policies. Given his repeated references to license renewal and the possibility of denial of renewal, and his discussions with FCC counsel culminating in copying her with the memorandum,^{26/} he clearly felt the FCC's Rules were being violated.^{27/}

184. Lauher also sent this memorandum to Bob Thompson, the FM Sales Manager; Ron Clemm, the FM Program Director; Dennis Stortz, the FM Operations Manager; and Paula Zika, the Stations' bookkeeper. KFUD Ex. 7, Tab 5, p. 10; Tr. 185.

^{26/} Cranberg acknowledged having received the March 9, 1989 Memorandum. KFUD Ex. 8, p. 5.

^{27/} Lauher was no hero in these matters. Much of the EEO misconduct he reported occurred on his watch. Furthermore, his memoranda cite the possibility of competing applicants and possible denial of license renewal as the only reasons for compliance. Not a word in Lauher's writings suggests that it ever occurred to him that discrimination is morally repugnant.

185. Although Lauher had no responsibilities for KFUD(AM), he sent the Memorandum to Jerry Householder, the AM Manager. Id. Lauher testified that he did so because of his concerns relating to license renewal:

although this was not an area where I held any position, it came up due to the fact that I had had the conversations with Marcia Cranberg regarding these matters. So, clearly, that the two in my mind, the two stations jointly owned and moving toward a period of license renewal, I had some concern that perhaps the AM also was violating this policy, because this policy said there would not be discrimination on the basis of religion.

Tr. 162.

186. Lauher's written testimony could not have been more inconsistent with the March 9, 1989 memorandum. His written testimony states:

My concern at the time I prepared the memorandum was that a common application form was used for both the AM and FM stations and that with the form there was some language relating to theological experience that might not be appropriate for all hires. I was also concerned that some of the job descriptions for the FM station might not reflect our EEO policies because the opening paragraphs spoke about saving the Lutheran Church. The March 9, 1989 memo did not deal with recruiting efforts. My concern was not with the station's EEO policies or recruitment, but rather the application form and the job descriptions. We had increased the number of women employees at the station and had minority representation. When I said on Page 7 of that memo that "we are operating in violation of our own policy as currently on file," I did not mean that we were violating FCC policies but simply that if there was to be one EEO policy for the AM and FM stations, there appeared to be a contradiction with the requirement for religious training for a number of the positions. My reference on page 5 to "indvertent noncompliance" referred to the same issue.

KFUD Ex. 6, p. 2 ¶4.

187. However, the statement on p. 7 of Lauher's March 9, 1989 Memorandum to Devantier that "I have discovered we are operating in violation of our own policy as currently on file" cannot be explained away as simply a reference to "a contradiction with the requirement for religious training for a number of the positions." The "I have discovered..." statement on p. 7 Lauher's Memorandum immediately followed the sentence "[i]f the record is thought to be inadequate, the FCC may take various actions, including denial of license renewal." Following the statement that "we are operating in violation of our own policy as currently on file" Lauher stated "I have reason to believe this applies to the AM operation as well as the FM operation" (emphasis supplied).

188. Lauher's March 9, 1989 Memorandum went on to state that the Stations' "performance compared to our EEO promises filed with FCC is as follows", whereupon he enumerated several specific areas of noncompliance. These included: (1) an uncorrected representation to the FCC that Abatie was responsible for administration and implementation of the EEO Program when, actually, that had been Devantier's responsibility; (2) the fact that, for a time, KFUE's employment application form did not contain a statement that discrimination is prohibited and that job applicants may notify the appropriate agency if they believe they have been victims of discrimination; and (3) the fact that job descriptions had been subjective, which could lead to the inference of discrimination. KFUE Ex. 7, Tab 5, pp. 8-10. Obviously, these statements in Lauher's March 9, 1989 Memorandum referred to far more than just "a contradiction with the requirement for religious training for a number of the positions."

189. Similarly, the statement on p. 5 of Lauher's March 9, 1989 Memorandum to Devantier that KFUD was "in a non-compliance situation", did not refer only to "a contradiction with the requirement for religious training for a number of the positions." The "non-compliance situation" reference in Lauher's Memorandum concluded a paragraph which spoke only to FCC compliance. That paragraph also expressly stated that the question "[i]s the station following its own plan?" was the test for whether the FCC views a licensee as complying with the EEO Rule. KFUD Ex. 7, Tab 5, p. 5.

190. Thus, Lauher's written testimony must be found to contain repeated material misrepresentations of his March 9, 1989 memorandum to Devantier. Lauher's written testimony was prepared at the Stations with the participation of KFUD attorneys, who are KFUD's agents. KFUD included Lauher's written testimony as part of KFUD's Direct Case. Thus, KFUD is responsible for Lauher's deliberate misrepresentations.

191. On March 15, 1989, Lauher sent Devantier another memorandum, entitled "EEO Compliance." It consisted of Chapter 10 of the NAB's "EEO Handbook: A Practical Guide for Broadcasters." That chapter lists 130 steps the NAB believes that licensees should take to comply with the EEO Rule. KFUD Ex. 7, Tab 6, pp. 1-2. Next to each item, Lauher had either put a check mark, or the notation "NA", or no notation at all, reflecting FM EEO performance. Tr. 166.

192. Lauher's covering note to Devantier stated:

Out of the 130 measures listed, KFUD-FM has implemented or completed 79. Ten of the measures appear to be "Not Applicable" to our situation. The remaining 41 measures are currently being reviewed to see whether the action has been taken, needs to be taken or is not applicable to our situation.

193. Several of the items not checked by Lauher are so fundamental to any station's EEO program that Lauher, a person who knew enough about EEO compliance to have written the March 9, 1989 Memorandum, must have known "whether the action has been taken"; must have known that they were "applicable to our situation"; and consequently must have realized that these actions "need to be taken." Some of these items, which together encompass virtually every material provision in the affirmative action portions of the EEO Rule (47 CFR §§73.2080(b) and (c)) were:

Establish an EEO officer to implement your station's EEO program and to keep current on developments in the law. 28/ KFUE Ex. 7, Tab 6, p. 2.

Include a copy of your EEO program in personnel manuals and employee handbooks. 29/ Id., p. 3.

Communicate your station's EEO policy and your employment needs to sources of qualified applicants without regard to race, color, religion, national origin or sex, and solicit their recruitment assistance on a continuing basis. 30/ Id.

Maintain a list of the recruitment sources you will use in seeking qualified female and minority applicants. 31/ Id.

28/ See 47 CFR §73.2080(b)(1). Lauher's March 9, 1989 Memorandum stated that Abatie had been put forward to the FCC as the EEO Officer, although Abatie was no longer at KFUE. KFUE Ex. 7, Tab 5, p. 8.

29/ See 47 CFR §73.2080(b)(2). The Personnel Manual sent by Devantier to all KFUE employees in 1986 did not contain the radio stations' EEO program. See KFUE Ex. 7, Tab 4.

30/ See 47 CFR §73.2080(b)(3). Lauher had to have known this wasn't being done. He was the KFUE-FM General Manager and he had to make hiring decisions for most positions.

31/ See 47 CFR §73.2080(c)(2). Lauher testified that there was such a list, but he had never seen it. Tr. 169. Nobody's direct testimony mentioned any such list, and none was ever produced.

Maintain written records of all the referrals made by your recruitment sources, and inform recruitment sources, in writing, of the disposition of applicants they have referred. 32/ Id., p. 4.

Conduct a continuing review of your job structure and employment practices, and adopt positive recruitment, training, job design, and other measures to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility throughout the station. 33/ Id.

Where appropriate, post notices of vacancies in the station, and afford current employers the opportunity to apply for promotion. 34/ Id., p. 7.

Interview all applicants who appear to be qualified. If you decide that an applicant has insufficient qualifications to be interviewed, document and inform the applicant, in writing, of your reasons. 35/ Id.

32/ See 47 CFR §73.2080(c)(2)(v).

33/ See 47 CFR §73.2080(c)(3)(ii).

34/ See 47 CFR §73.2080(c)(4)(ii). Lauher testified that he was concerned that an employment application did not contain EEO language. Tr. 155-57. See discussion at ¶¶152-53 supra.

35/ Devantier testified that this was not done. Tr. 813.

194. Lauher's direct case testimony attempts to explain away the March 15, 1989 memorandum. He states:

I also reviewed the list of defensive measures contained in an EEO handbook prepared for broadcasters. I checked those items which I believed that KFUE-FM had implemented or completed -- approximately 70 of the items. I found that ten of the items on the list were not applicable to our situation and the remainder were under review.

KFUE Ex. 6, pp. 2-3, ¶5.

195. Lauher knew better. His March 15, 1989 memorandum explained what that "review" consisted of. It says that "[t]he remaining 41 measures are currently being reviewed to see whether the action has been taken, needs to be taken or is not applicable to our situation." KFUE Ex. 7, Tab 6, p. 1. As shown above, many of these items were not "under review" at all: Lauher knew that they had not been undertaken because it had been his job -- and Devantier's job -- to undertake these actions. But he knew that he and Devantier had not performed their jobs. Lauher did not explain why he needed to write the March 15, 1989 memorandum at all if the unchecked items were genuinely "under review."

196. Devantier says he reviewed both Lauher memoranda and claims that he spoke with Lauher about them. KFUE Ex. 7, p. 10, ¶18(c). Although these memoranda made it clear that the stations were not complying with the EEO Rule or the stations' own policies, Devantier says he only told Lauher "to do what he needed to do to ensure continuing compliance" (emphasis supplied). Id. No one could possibly have read Lauher's two memoranda and genuinely believed that the task at hand was to insure "continuing" compliance.

197. Devantier's testimony goes on to state:

I also notified the Standing Committee on Broadcast of the Church's Board for Communications Services, at its next meeting on April 5, 1989, of the "importance of adhering to laws and regulations pertaining to the Federal Equal Employment Opportunity programs."

Id.

198. That statement looks wonderful out of context but takes on quite the opposite meaning in full context. This one set of minutes referred to by Devantier is the only document in the record showing that the Standing Committee on Broadcast ever discussed EEO at all. At that meeting, EEO was item #6 of seven items discussed. In its entirety, the EEO item reads as follows:

In the matter of Radio Station Licensing, Rev. Devantier pointed out the importance of adhering to laws and regulations pertaining to the Federal Equal Opportunity programs. Following discussion it was resolved that:

KFUO-AM and FM operate under a single EEO program and that positions descriptions be reviewed and revised as necessary to assure that the special background and experience for entry level into the individual position be specified.

199. Thus, the discussion did not focus on EEO compliance, but on licensing. It addressed only one of the dozens of matters in Lauher's two March, 1989 memoranda, revisions in position descriptions.

200. Furthermore, the action taken after the meeting to implement the one item which was discussed aggravated and expanded KFUD's preexisting discriminatory practices. In June and July, 1989, at least four position descriptions were revised: FM General Manager (adding religious related duties to the description), FM Program Director (imposing a religious qualifications test although still identifying no religious duties), Secretary to the FM Program Director (imposing a religious qualifications test although still identifying no religious duties) and AM Secretary (imposing a religious qualifications test although still identifying no religious duties). NAACP Ex. 41; see Table 4 supra. Thus, in three of these four new position descriptions, KFUD built upon its long standing practice of imposing religious qualifications for jobs whose duties did not require them.

201. Stortz also received copies of both the March 9, 1989 and March 15, 1989 Lauher memoranda. KFUD Ex. 7, Tab 5, p. 10; KFUD Ex. 7, Tab 6, p. 1. Thus, he was aware that serious arguments had been made internally that KFUD was not complying with the EEO Rule. Yet Stortz identified nothing he did in response to these memoranda.

202. Indeed, after March, 1989, when Lauher sent his two memoranda to Devantier, the other senior managers, and counsel, fourteen persons were hired without the use of either minority or nonminority secular recruitment sources, as shown in Table 6.^{36/} See KFUD Ex. 4, Tab 6, pp. 6-8 and 14-15.

^{36/} They were hired through employee referrals (word of mouth), "resumes on file", in-house publications, Concordia Seminary or other Lutheran institutions without an indication that African American Lutheran institutions were among those contacted, or the "rehire" of a former employee without any indication that status as a former employee vested the individual for subsequent openings.
Id.

TABLE 6

**KFUD HIRES FROM MARCH 15, 1989 TO JANUARY 31, 1990
FOR WHICH NO OUTSIDE RECRUITMENT OCCURRED**

<u>Name</u>	<u>Position; Fulltime (F.T.) or Parttime (P.T.)</u>	<u>Date Hired</u>
Lucy Walker	F.T. Sales Worker	3/20/89
Glynette Wells	F.T. Sales Worker	3/20/89
Jeffrey Meyer	P.T. Announcer	4/10/89
Daniel Ramsey	P.T. Announcer	4/24/89
Carolyn Miller	F.T. Sales Worker	5/15/89
Frank Wood	F.T. Sales Worker	6/19/89
Christine Keseman	F.T. Secretary	8/23/89
Angela Burger	F.T. Ass't. Dir. Development	9/18/89
Wynn Bressler	F.T. Sales Worker	9/18/89
David Schultz	F.T. AM Station Manager	9/25/89
Marty Reed	P.T. Announcer	10/10/89
Jason Cashmer	P.T. Announcer	11/1/89
Gertrude McClees	P.T. Secretary	11/14/89
Todd Wilken	P.T. Announcer	1/20/90

3. Reliance On Counsel

203. Devantier testified that "[w]ith regard to the legal arguments, we relied on the advice of our counsel, Arnold & Porter[.]" KFUD Ex. 7, p. 11 ¶20. He said he believed that he would "hear directly from the firm if FCC rules or policies changed in a way which would have required dramatic changes in our EEO program. I did not receive any such communications with such counsel." Id., p. 10, ¶18.

204. Lauher's March 9, 1989 Memorandum to Devantier said that Cranberg had advised Lauher that a station's compliance with its own model EEO program was a primary indicator of compliance with the FCC's EEO Rule. KFUD Ex. 7, Tab 5, p. 5. Lauher added that

Cranberg stated that even a requirement that an individual be a Christian would be deemed to have racial overtones.

Id., p. 6.

205. However, Cranberg's written testimony stated that when she subsequently assisted Stortz with the license renewal applications, she

did not focus on the fact that KFUA(AM) had a religious program format, and that there were likely to be requirements for knowledge of Lutheran doctrine for certain positions.

KFUA Ex. 8, p. 2.

206. Cranberg's failure to mention this issue in her pre-renewal conversation with Stortz did not matter, because Stortz was already on notice of Cranberg's concerns. He had received a copy of Lauher's March 9, 1989 Memorandum to Devantier in which Lauher quoted Cranberg as saying that that a requirement that an individual be a Christian could have racial overtones. KFUA Ex. 7, Tab 5, p. 10 (showing that a copy was sent to Lauher.)

207. Arnold & Porter sent numerous letters relating to EEO compliance to KFUA between 1985 and 1990.^{37/} KFUA Ex. 8, pp. 2-3. They included:

- A March 24, 1986 letter to then General Manager Emil Wilde (see Joint Ex. 1) from Reed Miller informing Wilde of the NAB's Employment Clearinghouse and recommending that it be used as a source of minority and female job candidates. NAACP Ex. 42. There is no evidence that KFUA ever used the NAB Clearinghouse.
- A November 24, 1986 letter to Stortz from Reed Miller, enclosing the FCC's proposal for a new form of EEO reporting. NAACP Ex. 43.

^{37/} Some of these letters were drafted by Cranberg and signed by Reed Miller; others were drafted by Reed Miller personally. Tr. 1033-34 (Testimony of Marcia Cranberg).

- A June 23, 1987 letter to Stortz from Reed Miller, supplying and annotating the EEO Report and Order [2 FCC Rcd 3967 (1987)] which includes, inter alia, the incorporation of additional EEO procedures into the EEO Rule, and a new Form 396. KFUE Ex. 8, Tab 2.
- An April 6, 1988 letter to Stortz from Reed Miller, supplying a recent decision renewing the license of WNCT-TV, Greenville, NC with conditions, and noting that "[t]his action might serve as a reminder to review the FCC's rules pertaining to equal employment opportunities in order to ensure compliance with these requirements. KFUE Ex. 8, Tab 3; also at NAACP Ex. 45.
- A November 1, 1988 letter to Stortz from Reed Miller, supplying the text of Beaumont NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988), in which the Court ordered the Commission to hold a renewal hearing on EEO and misrepresentation issues. KFUE Ex. 8, Tab 4.
- A February 28, 1989 letter to Stortz from Reed Miller, supplying an FCC order which held that broadcasters are permitted to keep track of the race and sex of applicants, affirming that broadcasters are expected to report the number of minority and female referrals they receive, and noting that "[s]tations which receive applications through the mails should also make an effort to follow up with the applicant to determine race or sex." The letter added that "[y]ou should be aware that the FCC is increasingly scrutinizing the recruitment practices of licensees to determine whether stations are complying with the applicable equal employment opportunity requirements. Consequently, it would be wise for all licensees to carefully review their procedures for recruiting qualified minority and female applicants, and for retaining information on the sex and race of referrals to ensure that these procedures are effective and in compliance with applicable law." MMB Ex. 20, also at NAACP Ex. 46.

- A May 9, 1989 letter to Stortz from Reed Miller, urging that "the contacts with minority and female referral sources must be genuine and substantial" and "referral sources should be regularly checked[.] MMB Ex. 22.
- A June 21, 1989 letter to Stortz from Reed Miller, reporting that there has been an increasing number of cases in which sanctions for EEO violations have issued "even in situations where no petitions to deny had been filed." The letter advised that "licensees should utilize both female and minority recruitment sources for each job opening at the station....[m]oreover, if the recruitment sources used by the station fail to turn up minority or female applicants, the licensee must make efforts to determine why this is so, and attempt to develop more effective minority and female recruitment alternatives. The licensee's contacts with minority and female recruiters must be meaningful and genuine." MMB Ex. 21, also at NAACP Ex. 47.
- A November 21, 1989 letter to Stortz from Reed Miller, again advising that "in filling job openings, stations must regularly utilize recruitment sources which are likely to refer qualified minority applicants" (emphasis in original). MMB Ex. 23.

208. Official notice may be taken that in stating EEO law, Arnold & Porter's all-client letters were generally accurate.

209. Stortz did not followup with Reed Miller in response to any of these letters. Joint Ex. 2, pp. 12-18. He testified that he did nothing with these letters except read them and pass them on to others. Tr. 611.

210. Cranberg characterized these letters as routine missives sent to all broadcast clients. Id., p. 2. Stortz said that "each of these letters appeared to be a form letter." KFUO Ex. 4, p. 13. However, Stortz did not say that the letters appeared to him, at the time he received them, to be form letters or to be unimportant. KFUO couldn't have thought the letters were too unimportant, since it paid Arnold & Porter for its legal services in sending these letters.^{38/} Tr. 550 (Testimony of Dennis Stortz).

211. Devantier did not know the extent to which KFUO kept Arnold & Porter apprised of its EEO programs, policies and procedures. He trusted others to do this but did not recall specifically instructing anyone to keep Arnold & Porter informed of these matters. Tr. 810-11 (Testimony of Paul Devantier). Stortz testified that during the license term, he never contacted Arnold & Porter seeking specific advice. Tr. 768.

212. Toward the end of the license term, Arnold & Porter did have occasion to respond to Lauher's specific EEO inquiries. On December 28, 1988, Cranberg wrote to Lauher to respond to his questions concerning renewal requirements. Cranberg supplied Stortz with the EEO Rule, copies of KFUO's 1986-1988 recent annual employment reports, and a copy of KFUO's most recent (1983) EEO program. KFUO Ex. 8, Tab 5.

^{38/} This is the same KFUO which told the FCC that it could not afford to do job recruitment. See discussion at ¶¶159-167 supra.

213. Apparently Lauher and Cranberg had had a conversation about whether the AM station could be excused for not having complied with the EEO Rule. No other predicate could have existed for Lauher's report to Devantier that Cranberg told Lauher that "[t]he better part of safety is to comply with EEO for both FM and AM unless a reasonable argument with respect to AM can be advanced and the [C]ommission has previously waived requirements for similar situations.' She knows of no similar situations that might apply." KFUO Ex. 7, Tab 5, p. 6.

214. By letter of April 4, 1989, Cranberg wrote Lauher to amplify on this subject. KFUO Ex. 8, Tab 6. Her letter enclosed and cited Trygve J. Anderson, 34 FCC2d 937 (1972) ("Anderson"). Cranberg stated that Anderson allows a "limited exemption" to the nondiscrimination requirement for persons hired to espouse a particular religious philosophy over the air." Cranberg also enclosed a copy of King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir. 1974) ("King's Garden"), which affirmed Anderson.